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SUBJECT: Brazil: Competition Policy Overview

Summary

¶1. (SBU) Brazil's Competition Policy System (SBDC) is awaiting Congressional approval of major reforms to restructure its three constituent agencies, add much-needed professional staff, and implement substantive reforms (notably, pre-merger notification requirements). In a February 1 meeting, Arthur Badin, President of the Brazilian Administrative Council for Economic Defense (CADE), discussed the prospects for passage of the reform (which he predicts will be signed into law by July) and consequences for SBDC if the reform does not pass. SBDC has made substantial functional improvements in the last 10 years and is active internationally. As SBDC continues its modernization process, prospects for increased cooperation between the United States and Brazil on competition policy are excellent. End summary.

Background - Current Competition Policy System in Brazil (SBDC)

¶2. (U) SBDC comprises three agencies - CADE, the Ministry of Justice's Secretariat for Economic Law (SDE), and the Ministry of Finance's Secretariat for Economic Monitoring (SEAE). SDE investigates anticompetitive conduct and issues non-binding opinions in merger cases. SEAE issues non-binding economic-impact opinions in merger reviews, may issue non-binding opinions related to anticompetitive conduct, and also performs a competition advocacy role within the government of Brazil. CADE has the exclusive authority to make final rulings on the investigations performed by SDE and SEAE.

¶3. (U) SBDC was created in 1962 and first amended in 1994, creating CADE as an autonomous body under the umbrella of the Ministry of Justice. The President, Attorney General, and seven Councilors (equivalent to Federal Trade Commissioners) of CADE are appointed by the Brazilian President and approved by the Senate. A 2000 amendment mandated a strong emphasis on combating cartels, along with the adoption of a consumer welfare perspective, giving SBDC important new powers in conducting investigations, notably powers to conduct dawn raids and to institute a leniency

program that provides reduced penalties and criminal immunity for cartel members who report themselves to SDE. (NOTE: Only the first cartel member to report the illegal activity and cease involvement qualifies for the reduction in penalties, which varies depending on SDE's degree of prior knowledge about the cartel. END NOTE)

¶4. (U) Further amendments in 2007 clarified procedures for settling anti-competitive conduct cases (e.g. abuse of market dominance) and extended CADE's authority to reach settlement agreements in cartel cases, which had previously been excluded. A company under investigation can propose a settlement at any point during the SBDC analysis but must reach agreement within 30 days of beginning negotiations. In leniency cases, the company must admit guilt, but in other cases CADE may grant a settlement with or without an admission of guilt. Settlements in non-leniency cases entail administrative but not criminal immunity.

¶5. (U) Although the three current agencies of SBDC have attempted to divide labor efficiently amongst them, there is some overlap and delay inherent in the way the system is presently organized. For example, even in cases SDE determines to dismiss, CADE must conduct a second review. In 2009 (data not including December), the full SBDC analysis of merger cases took an average of 179 days, including an average 44 days in CADE after SDE and SEAE reviews are completed. That said, 2009 data represent a substantial improvement in processing time from 2005, when cases

took 252 days to be reviewed, 81 in CADE. The decrease in the average processing time for merger reviews is due in large part to a "fast-track" procedure that CADE and SDE formalized in 2003 for cases considered to be uncomplicated and not likely to cause damage to competition. From 2005-2009, 73% of merger cases were examined under the "fast-track" procedure, freeing resources to focus on cartels, considered the most economically damaging type of anti-competitive conduct. SDE, particularly, focuses much of its attention on cartels through the dawn raid and leniency programs, in addition to maintaining a cartel tip hotline and conducting public awareness campaigns about the effects of cartels on consumers.

Much-Needed Reforms

¶6. (U) Draft law 3937 of 2004 proposes to unify the functions of the three existing agencies of SBDC under one reformulated CADE. The new CADE would maintain its current position as an independent agency linked to the Ministry of Justice. The bill would also extend the terms of CADE's seven councilors from two to four years, impose pre-merger notification requirements, and create 200 permanent staff positions for the new CADE. These proposed reforms have been praised by the OECD, the International Competition Network (ICN), and the U.S. Federal Trade Commission (FTC).

¶7. (SBU) CADE President Arthur Badin told Econoff on February 1 that he considers the reform bill Brazil's only way to make "the next big leap to modernization of competition policy." Badin said further reductions to case processing time would not be possible if the reform bill does not pass. If the bill passes, he predicted 93% of cases will be decided in fewer than 20 days due to elimination of duplicative analyses and the implementation of mandated timelines for each phase of review. Passing the bill is Badin's number one priority, and he said he is confident it will be signed into law by July. The reform bill was approved by the Brazilian Chamber of Deputies in December 2008 and subsequently by

five committees in the Senate. It must now be voted by the full Senate, sent back to the Chamber for final approval, and then forwarded to the President for signature in order to pass into law. If the reform does not pass in the first half of the year, it will very likely suffer from waning attention in the run-up to the October 2010 Brazilian elections for President, governors of 26 states and the federal district, two-thirds of the Senate, and all members of the Chamber of Deputies. Badin, while confident that the bill will pass into law before July, said that quick passage is critical, since it is unclear when or if a new government - which will not be in place until January 2011 - would consider the reforms again.

18. (SBU) In addition to gains in efficiency due to the proposed reorganization, the positions created by the reform bill will provide critical human resources. Currently, the three competition agencies are understaffed and have high rates of employee turnover. For example, CADE has fewer professional staff (49) than the number of PhD economists in the Federal Trade Commission's Bureau of Economics alone (approximately 70). CADE, SDE and SEAE employees are often seconded from other ministries, do not necessarily have specific competition policy training, and have limited options for promotion and career growth within the competition system. Badin stated the creation of 200 new positions and a structure for career growth within CADE is critical for training and retaining talented economists and analysts. Badin noted the budget for the new positions has already been approved by the Ministry of Planning. He generally did not consider budget an issue for CADE, as the agency brings in more revenue from case fees than it expends and expects to expend in the new, reorganized agency.

19. (SBU) The reform bill also includes several important substantive changes. One of the most significant is the implementation of pre-merger notification requirements. Today, parties to a merger are not required to notify SBDC until after the merger takes place. Therefore, the parties do not have the pending merger consummation as incentive to assist in the merger review as quickly as possible. In practice, this also limits the possible remedies, since it is very difficult to reverse a merger once it has been consummated - Badin compared it to "unscrambling eggs." The reform bill would require the parties to notify CADE before taking action to consummate the merger and implements deadlines for several stages of review by CADE. The proposed deadlines vary depending on whether CADE requests additional information and, if so, at what stage, but are generally in line with international standards and would allow "non-complex" cases to be decided in fewer than 20 days.

OECD Peer Review

10. (SBU) The Organization for Economic Cooperation and Development (OECD) is currently conducting a peer review of competition law and policy in Brazil. In the last peer review (2005), the OECD found that SBDC had made significant progress in implementing sound competition policy in Brazil. "The [SBDC] agencies," the report said, "exhibit a strong institutional dedication to high standards of integrity, autonomy, sound policy, and fair procedure; have an excellent leadership cadre; and enjoy a supportive business community." Nonetheless, the report cited a counter-productive institutional structure, inadequate staff, certain problematic statutory provisions, and a slow judicial review system as areas for improvement. The OECD report recommended several alterations to the competition law, which were subsequently incorporated into the reform bill discussed above. The current

OECD report is not yet available, but CADE President Badin told Econoff he anticipates that most weaknesses the report is likely to identify would be remedied by passage of the pending reform legislation.

¶11. (SBU) One area not addressed by the reform bill is the judicial appeal process, which is notoriously slow in Brazil. According to CADE's 2008 annual report (the most recent available), only 3.8% of fines assessed between 2002 and 2004 were paid and only 18% of decisions between 1994 and 2005 were implemented, due mostly to lengthy and ongoing judicial appeals. Badin acknowledged the problems with the judicial system, but noted these broader systemic issues are beyond the scope of specific competition policy system reform.

International Engagement

¶12. (SBU) CADE is an active member of the International Competition Network and attends all meetings of the OECD Competition Committee. Badin said CADE is discussing with the OECD the possibility of opening a competition training center in Brazil to provide courses for competition authorities in the region. CADE currently coordinates a training course (with funding from the Brazilian Cooperation Agency [ABC] - USAID equivalent) for competition practitioners from Latin America, which Badin said is particularly helpful for dealing with regional "peculiarities" (such as, "a negative connotation associated with plea bargains") not necessarily found in the American or European models.

¶13. (SBU) In 1999, the United States and Brazil signed a formal cooperation agreement regarding cooperation between the countries' competition authorities. FTC's Office of International Affairs describes the history of cooperation with CADE as both "long and deep." Recent examples of such cooperation have included a visit by two FTC economists to a CADE training on merger analysis and the participation of two CADE economists in an FTC program

allowing foreign anti-trust officials to work at FTC for three to six months. As a result of discussions at the December 2009 meeting of the Bilateral Consultative Mechanism between the Office of the United States Trade Representative and the Brazilian Ministry of External Relations (MRE), FTC and CADE have begun informal information exchanges regarding competition in the generic drug industry. Both Brazil and the United States have expressed interest in expanded exchanges on competition policy and technical issues of mutual concern.

Comment

¶14. (SBU) The competition reform bill currently pending before the Brazilian Congress is critical to enable SBDC to modernize and fully implement international best practices. CADE, which may soon become the single competition authority in Brazil, is eager to deepen engagement with the United States. President Badin welcomed continued cooperation between the United States and Brazil on competition policy and particularly praised exchanges such as the opportunity for CADE economists to work at FTC and Embassy Brasilia's efforts (currently underway) to arrange a

Voluntary Visit by a group from the CADE prosecutor general's office to the United States. In competition policy, as in many areas, Brazil is emerging as a regional and global player. It may be particularly useful for the United States to consider supporting efforts, such as perhaps the regional training course funded by ABC, that position Brazil as a partner for developing effective competition policy throughout the region and beyond. End comment.
SHANNON